Office of Administrative Law Judges

MEMORANDUMDATE: July 25, 2006

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT:DEPARTMENT OF THE NAVY

NAVAL AVIATION DEPOT
JACKSONVILLE, FLORIDA
Respondent

and

Case No. AT-CA-04-0318

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL 22
Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, exhibits and any briefs filed by the parties.

Enclosures

DEPARTMENT OF THE NAVY
NAVAL AVIATION DEPOT
JACKSONVILLE, FLORIDA
Respondent

and

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS,
LOCAL 22
Charging Party

Case No. AT-CA-04-0318

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 28, 2006**, and addressed to:

Federal Labor Relations Authority

Office of Case Control

1400 K Street, NW, 2nd Floor

Washington, DC 20005

RICHARD A. PEARSON

Dated: July 25, 2006

OALJ 06-23

DEPARTMENT OF THE NAVY
NAVAL AVIATION DEPOT
JACKSONVILLE, FLORIDA
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and

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS,
LOCAL 22
Charging Party

Case No. AT-CA-04-0318

Peter Hines
For the General Counsel
Joseph T. Quina
For the Respondent
Earl Gregory Baseman
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

Based on an unfair labor practice charge filed by the International Federation of Professional and Technical Engineers, Local 22 (the Union or Charging Party), the Regional Director of the Authority's Atlanta Region issued a Complaint and Notice of Hearing on June 30, 2004, alleging that the Department of the Navy, Naval Aviation Depot, Jacksonville, Florida (the Agency or Respondent) violated section 7116(a)(1) and (5) of the Statute by implementing changes to its promotion procedures without negotiating to the extent required by the Statute. The Respondent filed a timely answer, denying that it committed an unfair labor practice and asserting several affirmative defenses.

A hearing in this matter was held in Jacksonville, Florida, at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered. I conclude, in agreement with the General Counsel, that the Respondent violated § 7116(a)(1) and (5) of the Statute.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Union is the exclusive collective bargaining representative of a bargaining unit of nonprofessional employees at the Agency. It represents a little over 800 employees there, working in GS-1 through GS-13 jobs, while four other unions represent another 4000 employees at the same facility. Tr. 17, 41-43. The Union has been a party to a series of collective bargaining agreements (CBAs) with the Agency. One such CBA was signed by the parties in October 1997 (Resp. Ex. 1) and remained in effect until a successor agreement was approved by the Department of Defense in October 2003 (Resp. Ex. 2).

The instant case involves the procedures used by the Agency to make promotion selections. In the 1997 CBA, Article 16 addressed this issue in general, requiring for instance that vacancies normally be filled competitively and that employees not selected for promotion be informed how to improve their chances. Resp. Ex. 1 at 16-17. Section 5 of that article provided:

Selection Advisory Boards (SAB) for filling Unit vacancies will be conducted in accordance with NADEPJAXINST 12000.1 (latest version). When it is determined that an SAB will be convened, the Employer will contact the Union to provide either one Unit Employee member for a three-member SAB or two Unit Employee members for a five-member SAB.

The full text of NADEPJAXINST 12000.1 (Instruction 12000.1), an internal Agency regulation or instruction, was not offered into evidence, but it is apparent from the record that it provided detailed requirements as to when SABs were required, how they were to be constituted, and the procedures they would follow. SABs were required for filling permanent vacancies at the GS-7 level and above. Tr. 64-65. The board would rate the applicants based on criteria established by the selecting official, and it would submit a recommended applicant and an alternate to the selecting official; however, the selecting official retained the right to select any applicant, even one not recommended by the board. Tr. 19-20; G.C. Ex. 3 at 3-4. This process had been used at the Agency since at least 1988.

Between August 2002 and April 2003, the Union and the Agency engaged in a grievance dispute concerning the application of Instruction 12000.1, pursuant to the 1997 CBA. In August 2002, the Agency asked the Union to nominate two members of a five-member SAB. But when the Union submitted two employees' names, the Agency rejected them as unqualified for that particular promotion board. Resp. Ex. 4. The Union argued that the CBA and Instruction 12000.1 required management to accept the employees nominated by the Union; the Agency disagreed, and ultimately an arbitrator ruled in favor of the Agency. *Id*. In a decision dated April 25, 2003, the arbitrator ruled that under Instruction 12000.1 and under section 7106(a) of the Statute, the chairman of an SAB retains the power to appoint its members, and that if the Union could dictate the members of the SAB it would be a direct interference with a statutory management right. *Id*. During the time that this grievance was pending arbitration, the Union also filed two unfair labor practice charges, alleging that the Agency had violated the Statute by refusing to accept the Union's nominees for two separate SABs. Resp. Ex. 8, 9. Both of these charges were ultimately withdrawn by the Union.

Starting in April of 2000, the Union and the Agency began negotiating a new CBA, and these negotiations culminated in the second half of 2002. The Union sought to have portions of Instruction 12000.1 incorporated into the contract itself, and ultimately the Agency agreed to detailed language concerning SABs in Article 16, Section 8 of the new CBA. Tr. 73. A CBA was signed by Union and Agency negotiators on January 9, 2003. Tr. 82-83. When the agreement was submitted for agency head review, however, management officials at the Department of Defense (DOD)

notified Agency officials in Jacksonville that several provisions of the CBA, including Article 16, Section 8, did not conform to law, rule or regulation, and as a result the CBA was disapproved on February 7, 2003. Tr. 74-75; Resp. Ex. 3. On April 11, 2003, the Department of Defense sent a detailed letter to the Agency's Commander, specifying why each provision was found unacceptable. It stated that union participation on SABs "is non-negotiable as it is contrary to 7106a(2)(c) of the Statute" and cited the Authority's decision in *American Federation of Government Employees, Local 1815 and U.S. Department of the Army, U.S. Army Aviation Center and Fort Rucker, Fort Rucker, Alabama*, 53 FLRA 606 (1997) (*Fort Rucker*). [1/]

Thus in early 2003, the Agency and the Union were back at the bargaining table, seeking to resolve the eighteen enumerated provisions of their agreement that had been disapproved, one of which was the provision concerning selection advisory boards. While the Union was still interested in securing some contractual basis for the use of SABs, it also wanted to see a CBA executed, and it ultimately recognized that it would not be able to finalize a CBA that contained references to SABs. Tr. 190-91. The parties then discussed the possibility of a memorandum of understanding (MOU) on the subject, but the Agency felt that this would be similarly unacceptable. *Compare* Tr. 90-94 *and* 191-94; Resp. Ex. 11. As a result, nothing specific was negotiated on this issue. According to the Union negotiators, Agency representatives advised them that the SAB instruction would be revised in the near future, and the parties agreed to deal with the procedures concerning SABs in the context of a revised instruction. Tr. 50-51, 194-99; *cf.* Tr. 93-94. The parties reached agreement on a new CBA on October 1, and DOD approved it on October 7, 2003.

Ten days later, on October 17, the Agency submitted to the five unions on base the draft of a revision to the procedures for selection advisory boards. The Agency called the union representatives together on that date and briefed them on the new procedures and advised them to follow the contractual procedures if they wished to negotiate. Tr. 21, 100; G.C. Ex. 2. Each of the unions did separately request to negotiate, and the Charging Party submitted its written proposals to the Agency on October 28. G.C. Ex. 3. The Charging Party essentially proposed the same procedures as had been in the old instruction; the Union further offered explanatory language that emphasized the selecting official's sole discretion in making a final decision on promotions and the limited advisory role of the SAB in the process. *Id*. at 6-7. The Union asserted that the language regarding the role of the Union and bargaining unit employees on SABs was a negotiable procedure and arrangement under section 7106(b) of the Statute. *Id.* at 7.

The Union and the Agency met on three occasions to discuss the proposed revisions to the SAB procedures, on November 25 and December 15, 2003, and January 7, 2004. Greg Baseman, the Union President, was the Union's spokesman throughout the meetings, and Linda Anderson served as the Agency's chief negotiator. At the November 25 meeting, Baseman talked initially about ground rules for the negotiations, and then he explained the Union's proposals that had been submitted earlier. Management explained the purposes behind their own proposals, and the Union addressed some specific concerns about the language in the Agency's proposal. Tr. 24-26, 159-61. After the meeting, an Agency representative sent a copy of her notes of the meeting to the Union and Agency negotiators. Resp. Ex. 5. The December 15 meeting proved to be little more than a formality, as some of the Union participants were not able to come to the meeting; as a result, the meeting was adjourned almost immediately, although Baseman testified that one of his Union colleagues did present his own concerns about the SAB process and the need for Union participation. Tr. 27, 113, 161; Resp. Ex. 6. [2/]

At the final negotiation session, held on January 7, the Union reiterated why it wanted to continue the old SAB procedures, and it also presented some additional, or counter-proposals. Tr. 28-29, 113-14, 161-62. Three of these new issues were cited in the Agency's notes of the meeting (Resp. Ex. 7): the Union wanted the selecting official to provide an explanation in writing if he selected an applicant other than one of the SAB's recommended employees; the Union wanted the cover sheets of promotion applications to be removed, to protect the anonymity of the applicants; and it wanted an SAB to be required whenever a minority or woman applied for a position. According to Union President

1. / DOD's refusal to accept the SAB language in the contract did not, apparently, take the negotiators by surprise. Agency negotiators had been verbally informed earlier in 2002 that DOD believed that any Union participation in the SAB process was non-negotiable, and the Agency negotiators passed this information on to the Union. This did not, however, stop the Union from pursuing such language in the CBA, nor did it stop the Agency from agreeing to it. Tr. 76-79, 190-92.

2. / While Baseman attributed this discussion to the December 15 meeting, it appears that he may have confused the December 15 meeting with the January 7 meeting. *Compare* Tr. 27 *and* the participant lists in Resp. Ex. 6 and 7.

Baseman, the Agency did not offer any response to these proposals on January 7, but simply said they would take the Union's concerns into consideration. Tr. 29, 58. According to the Agency participants, however, Ms. Anderson addressed each of the three specific issues cited in Resp. Ex. 7. She told the Union that the new procedures already require a justification of any deviation by the selecting official from the board's recommendations, and that the Agency couldn't remove cover sheets from applications because this was handled by a different office and the cover sheet merged with the first page of the application itself. Tr. 115, 161-62. With regard to the third new Union proposal, the Union decided to withdraw it later in the day on January 7, as it decided this was best handled within the EEO process rather than the SAB procedures. Tr. 116, 162-64; Resp. Ex. 10. One of the Union representatives also requested information from the Agency on January 7 concerning the number of SABs held from 2000 to 2002, and the Agency provided this information to him. Tr. 116; Resp. Ex. 7.

At none of the three negotiation sessions did the Agency's negotiator agree to any specific Union proposal, nor did the parties sign off or initial any proposal from either side. Instead, the Agency sought to consolidate all the proposals and responses from the five unions and to respond to the unions' concerns in the best way the Agency was able. Tr. 120-21, 126-27, 170-71. In the Agency's notes of the January 7 meeting, which were sent to the Union the following day, the Agency stated: "Management stated they would review all the unions [sic] proposals, and get back with each union once they have revised their original proposal." Resp. Ex. 7.

The next contact between the parties concerning SAB procedures was on March 30, 2004, when the five unions were called to a meeting conducted by Anderson, who gave them what she called the final version of the instruction that would be implemented on April 5. Tr. 29, 117, 166. Anderson told them that management had considered all of their proposals and had incorporated "a lot" of their concerns into the final language. Baseman told Anderson at the March 30 meeting that negotiations with his union had not even started, that he didn't agree to the proposal, and he wouldn't sign it. Tr. 30-31, 167. Anderson, in turn, told the Union that this was the Agency's final offer, and if the Union didn't agree, it could pursue mediation or impasse resolution under the CBA. Tr. 118, 167. The Union did not pursue either mediation or impasse resolution, but instead it filed the instant unfair labor practice charge on April 1. The Agency did proceed to implement the new instruction, but the effective date was delayed until June 3, 2004, to enable the Agency to train some of the selecting officials on the new procedures. Tr. 119, 168.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

The General Counsel's primary argument in this case is that the Respondent declared impasse and terminated negotiations prematurely, and thereby it did not negotiate to the extent required by the Statute. Citing *Letterkenny Army Depot*, 34 FLRA 606 (1990), the GC asserts that procedures governing the promotion process are negotiable, and from this premise it argues that the Respondent's revision of its instruction governing the use of Selection Advisory Boards was a negotiable change in conditions of employment that had more than a *de minimis* effect on bargaining unit employees. The GC then argues that none of the recognized bases for implementing negotiable changes were present: *i.e.*, the parties had not reached agreement; there had been no impasse after good faith bargaining, followed by a failure to timely invoke impasse resolution procedures; and the Union had not waived its right to bargain. *See, e.g., U.S. Department of the Air Force, 832D Combat Support Group, Luke Air Force Base, Arizona*, 36 FLRA 289, 298 (1990) (*Luke AFB*).

The Respondent asserts several legal grounds for dismissing the complaint and for finding that it had no obligation to bargain at all with the Union over the SAB instruction. Noting the arbitration decision issued in April 2003 (Resp. Ex. 4), the Agency insists that the Union's unfair labor practice charge in the instant case challenges exactly the same provision that the Union challenged in the grievance that it lost in arbitration. Therefore, the Agency argues that the complaint is barred by section 7116(d) of the Statute. In a similar vein, the Respondent argues that the Union makes the same claim in this case that it made in filing and withdrawing unfair labor practice charges in August 2002 (Resp. Ex. 8) and January 2003 (Resp. Ex. 9). In both of those charges, the Union protested the Agency's refusal to accept the Union's nominees to two SABs, acts which the Union labeled as changes in the past practice of the parties. According to the Respondent, the Union's current protest of the Agency's change in SAB procedures is just a reiteration of the same claim it has been making for three years, and thus it is time-barred under section 7118(a)(4).

Next, the Respondent argues that it had no duty to bargain over the new SAB procedures because the subject is "covered by" Article 16 of the new collective bar-

gaining agreement. While Article 16, Section 5 of the 1997 contract expressly incorporated the requirements of the Agency's SAB instruction, and similar language was sought by the Union in the new contract, the language was rejected by the agency head and the final contract language included nothing about SABs. *Compare* Resp. Ex. 1 at 17 *and* Resp. Ex. 2 at 59-65. Similarly, no memorandum of understanding on SABs was negotiated to cover this topic. In the context of this bargaining history, the Agency says the Union bargained away its right to negotiate on this issue, and the Agency was free to revise its SAB instruction unilaterally. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004, 1017-18 (1993) (*SSA*).

Finally, assuming that it had a duty to bargain over the SAB instruction, the Respondent argues that it fulfilled its obligation and properly implemented the change. It notified the five unions on the base of the language of its proposed instruction, it met on three occasions with the Charging Party, and it modified some of its proposals to meet the unions' concerns. When the Agency notified the unions on March 30 that it was implementing a final version of the instruction, it either had reached an agreement with the Charging Party or it had reached impasse. The Union did not seek mediation or the assistance of the Federal Service Impasses Panel subsequent to March 30. Thus, in either case, the Agency was free to implement its March 30 proposal. *Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky*, 17 FLRA 896 (1985).

Regarding the Agency's defenses, the General Counsel argues first that the instant unfair labor practice charge, filed on April 1, 2004, was timely. The charge alleged, as does the complaint, that the Agency did not fully negotiate over changes in the SAB procedures. The Agency had just announced two days earlier that it was going to implement those new procedures, so the charge could not have pertained to the events that were the subject of the Union's 2002 and 2003 ULP charges. The earlier charges were based on disputed language in the prior CBA and the prior SAB instruction, and specifically over the ability of the Agency to reject Union-nominated SAB members; that was an entirely different issue than the Agency's implementation of new procedures in 2004. For the same reason, the GC asserts that section 7116(d) of the Statute does not apply to the instant case. The grievances which resulted in a 2003 arbitration decision concerned the relative power of the Union and the selecting official to name members to an SAB; while the parties continued to dispute this question in their 2003-2004 negotiations on the SAB instruction, the current ULP charge addresses the Agency's unilateral implementation of the new instruction, not the precise wording of the instruction itself.

The General Counsel refers to the Agency's "covered by" defense as a claim that the Union waived its right to negotiate the SAB instruction during bargaining on the CBA, and the GC rejects the argument. Reviewing the testimony concerning the CBA negotiations from 2002 through 2003, the GC asserts that the parties simply deferred the issue of SAB procedures, first from the CBA itself to a memorandum of agreement, and when that proved infeasible, until the Agency revised its SAB instruction. It was anticipated by the parties that there would be negotiations once the Agency submitted a proposed revision to the instruction, and in fact the Agency did precisely that ten days after the CBA was approved. Thus the GC argues that the Union did not waive its right to bargain on this issue, and the issue was not covered by the CBA.

ANALYSIS

1. Preliminary Issues

I will dispose of the Respondent's procedural arguments quickly, because I do not believe they have even a shred of merit, and proceed to the substantive issues of this case, which are more difficult.

The defenses offered under sections 7116(d) and 7118(a)(4) of the Statute are really two versions of the same argument. In both arguments, the Agency is claiming that the Union sought to relitigate old, rejected issues. In the 7118(a)(4) defense, the Agency points to two ULP charges the Union had filed, in August 2002 and in January 2003; since the issue in the current case is the same as the allegations in those old charges, the Agency reasons, the allegations are more than six months old and time-barred. In the 7116(d) defense, the Agency asserts that the current ULP charge seeks to relitigate the same issue that was raised and rejected in arbitration.

The problem with these arguments is that the premise is false. The ULP charges filed in 2002 and 2003 were essentially identical to the allegations the Union made in its 2003 arbitration, but the issue in those cases was quite different from the issue posed by the case before me. In 2002 and 2003, the Union objected to the Agency's rejection of its nominees for two different promotion boards. The selecting official felt those employees were unqualified, under the language of the old SAB instruction, but the Union asserted that the

Agency was required to accept the Union's nominees. That is not at all what is in dispute now.

First of all, the instant case arises under a new collective bargaining agreement, with different language than the one that was in effect when the earlier grievances and ULP charges were filed. The 2002 and 2003 grievances were based on the old CBA language, and the arbitrator's decision was based on that contract and the language of the old SAB instruction. In the case at bar, the Union is not arguing that it still has the power to name members of SABs; it is arguing that the Agency did not negotiate with it fully in revising the SAB instruction. It is true that in both situations, the Union is alleging that the Agency changed a condition of employment – the procedures for conducting SABs – but the nature of the alleged change is quite different in each case, and the events are separated in time by a year or more. The instant case deals with the Agency's actions, while negotiating and failing to negotiate, between October 2003 and March 2004; the other cases dealt with the Agency's actions in convening SABs in August and October 2002. The current ULP charge is therefore properly before me. *See OLAM Southwest Air Defense Sector (TAC), Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797, 801-02 (1996).

The Respondent's "covered by" argument is also rejected. The 2003 CBA says nothing whatever about selection advisory boards. While the 1997 contract at least referenced the Agency's instruction dealing with SABs, and the Union wanted to incorporate similar or stronger language in the 2003 contract, such language was rejected by the Commanding Officer, and subsequently the parties agreed to a CBA that contained no reference at all to SABs. Thus it is inappropriate to argue now that this very contract "covers" the issue of SABs, either expressly or impliedly, or that the issue of SABs is "inseparably bound up with" the language in Article 16 of the new CBA. *SSA*, 47 FLRA at 1018. Even in the old CBA, the substantive procedures for conducting SABs were addressed in an Agency instruction, separate and apart from the CBA; the contract simply stated that the instruction was binding on the parties, and required the Agency to contact the Union in naming members. Resp. Ex. 1 at 17. Article 16 of the new CBA provides for filling vacancies on merit, references the Agency's computerized database for posting vacancies, and sets guidelines for temporary details and job reassignments. Resp. Ex. 2 at 59-65. There is nothing about the Agency's system for selection advisory boards that is "inseparable" from these latter provisions. There is no reason to infer that by omitting the reference to Instruction 12000.1, the parties intended to give the Union and employees no role or say in the SAB process. This is especially true in this case, since at the time the new CBA was executed, on October 1, 2003, the old language of Instruction 12000.1 was still in effect, giving the Union authority to nominate employee members of SABs.

As the General Counsel noted, the Respondent actually seems to arguing that the Union's conduct during the 2003 CBA negotiations constituted a waiver of its right to bargain further on the subject of SABs, but this argument also fails. As a factual matter, it is clear to me from the testimony of both management and Union witnesses that the Union never abandoned its effort to negotiate specific rules for the conduct of SABs, but that it deferred those efforts from the CBA to the Agency instruction. Indeed, the Agency's conduct during the 2003 negotiations suggested to the Union that it would be more amenable to the Union's proposals in the latter context. Management negotiators in 2002 had agreed, in Article 16, Section 8 of the proposed new CBA, to specific language that provided more detail than the 1997 contract regarding the Union's role in SABs. Tr. 73-74, 84-86. After DOD instructed the Commanding Officer at the Agency to disapprove that language, the parties went back to the bargaining table and initially sought to incorporate similar language into an MOU, but since MOUs must also be approved by the agency head, it would have been rejected for the same reason. It was a management official who then suggested to the Union that the procedures could be negotiated when the Agency revised its SAB instruction. Tr. 190-94. The events immediately subsequent to the signing of the new CBA bore out the Agency negotiator's words: less than two weeks later, the Agency submitted its proposed revision of Instruction 12000.1, providing the parties the framework for negotiating new language. Thus I find that the Union did not waive its right to negotiate on the subject of SABs, but simply deferred those negotiations until the Agency sought to revise the instruction on the subject.

2. The October 2003 - March 2004 Negotiations

The basic facts surrounding these events are not in dispute. It is clear that the Agency did notify the Union in advance of the language of its proposed change to the SAB instruction; that the Union requested bargaining and offered a counter-proposal to the Agency; that the Agency terminated the bargaining process on March 30 when it announced its intent to implement final language; and that the Union did not seek the assistance of the FSIP subsequent to that March 30 announcement. The parties disagree on how to characterize the Agency's conduct during the negotiations and whether

the Agency was entitled to declare impasse on March 30 and to subsequently impose its final offer.

Section 7103(a)(12) of the Statute defines "collective bargaining" asthe performance of the mutual obligation . . . to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment . . . but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

This principle of collective bargaining is further described in section 7114(b)(1), which cites the duty "to approach the negotiations with a sincere resolve to reach a collective bargaining agreement." These same principles and obligations also apply to changes in conditions of employment during the term of a collective bargaining agreement. *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9 (1981). Moreover, in determining whether a party has fulfilled its bargaining responsibilities, the Authority considers the totality of the circumstances of the case. *U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 531 (1990).

The system of SABs that had been utilized at the Agency for many years prior to 2004 made such boards mandatory for all vacancies at the GS-7 level and above, and it allowed the Union a direct role in nominating employee (or "peer") members of the boards. Even after the previously-discussed arbitration ruling went against the Union in April 2003, the Union still had a right to nominate board members, although the selecting official had discretion to reject those nominees and ask the Union for additional names. Under the draft instruction proposed by the Agency in October 2003, SABs would be required only for GS-13 positions and above (which eliminated nearly all bargaining unit positions represented by the Union), and the unions would have no role whatever in nominating or selecting peer members. G.C. Ex. 2. While the new SAB instruction made many changes to the old system, these two changes stand out, and the Union clearly pressed the Agency to retain these provisions in October 2003 and beyond. Tr. 63-65, 104, 109-11, 160, 191. The Union also raised many other specific concerns about the draft proposed by the Agency, such as the definition of peer members, the use of board members from other military installations, encouraging interviews of applicants, and protecting applicants' anonymity. Resp. Ex. 5-7.

The parties held three bargaining sessions, but since some of the Union negotiators were unable to attend the December 15 session, bargaining occurred at only two of them. It appears that throughout the process, the Agency insisted that two of the most far-reaching changes in the new instruction (the grade levels at which SABs will be required and the Union's ability to nominate board members) were non-negotiable, on the same grounds as the agency head had previously disapproved the CBA. Tr. 171, 179, 183-86. At each of the substantive sessions, the Union negotiators identified a variety of issues regarding the proposals, the Agency negotiators offered feedback to the Union about those issues, and the Agency advised the Union that it would take those matters into consideration and get back to them. Tr. 58, 108. At no point during the sessions did the Agency suggest compromise language to proposals made by the Union, and at no point did the parties initial or otherwise reach agreement on any specific proposals. Tr. 26, 27, 33, 141-44. The first time that the Agency offered any modified language in its proposals was on March 30, when Ms. Anderson declared the negotiations over and asked each of the assembled unions to sign a document which she said would be implemented the following week. In this final version of the SAB instruction, the Agency included a provision that allowed each union to submit a list every three months of employees who were willing to sit on SABs, although the Agency was free to select anyone it wanted for the "peer" positions. Resp. Ex. 4 at 3. It also added the word "disability" to the list of subjects that selecting officials could not discuss when talking to a supervisor about an applicant (an issue the Union had raised on November 25). *Compare* Resp. Ex. 4 at 6 *and* Resp. Ex. 5. As in its original proposal, the Agency's final proposal required SABs only for GS-13 positions and higher.

Despite claims to the contrary by the management witnesses at the hearing, it is evident from the record that the parties never reached an actual agreement on the terms or language of the revised SAB instruction. Both Anderson and Hamilton, the Agency negotiators who testified about the bargaining sessions, initially asserted that when they left the January 7 session, they believed that they had reached agreement on all issues that were discussed; but when they were pressed for details on this point, they conceded that they never obtained any express statement of agreement from the Union on any of the issues, and that indeed the Union negotiators still insisted on language that the Agency would not accept. Tr. 116, 124-27, 165, 167, 178-81. With respect to the issue of "peer" members of SABs, the Union continued to demand more of a role than the Agency had offered on or before January 7, and even as of March 30; similarly, the Union continued to demand that SABs be

required for more positions than just GS-13 and above. Tr. 124-27, 178-81. [3/]

While the Agency witnesses suggested that by January 7 the Union was only pursuing three minor issues (see the three numbered items in Resp. Ex. 7), I reject that assertion, for the reasons stated above. Moreover, the record suggests that even with regard to these three items, the Union had not agreed to at least one of them. With regard to Item 2 (removing cover sheets to protect applicants' anonymity), the Agency witnesses testified that Anderson told the Union that this was something they had no control over, that the cover sheets came to the Agency this way from the service center. Tr. 115, 161-62. Thus, while the Agency may have believed that its response sufficed to end the discussion, it is clear that the Union did not consent to the existing language. This was similarly true concerning a wide range of other issues. The Agency in general, and Anderson in particular, seem to have concluded that management's rejection of a Union proposal was tantamount to the issue being resolved. This is not, however, the meaning of "agreement" under the Statute. Rather, the Authority has explained that an agreement "is one in which authorized representatives of the parties come to a meeting of the minds on the terms over which they have been bargaining." *U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 317 (1997). Looking at the entire history of the parties' negotiations up to and including March 30, 2004, it is abundantly clear that the Union continued to disagree with many of the Agency's proposals, and that there was never a meeting of the minds on the terms of the SAB instruction. Therefore, the Agency's implementation of the instruction cannot be justified on the basis of the parties having reached agreement.

As Ms. Anderson told the Union on March 30, however, perfect and mutual agreement is not necessary for management to implement the terms of its final proposal, if an impasse has been reached pursuant to good-faith bargaining, and if the Union has failed to file a timely impasse resolution request. *Luke AFB, supra*, 36 FLRA at 298 (1990); *Department of Justice, United States Immigration and Naturalization Service, El Paso District Office*, 25 FLRA 32, 37 (1987). Despite her description of the negotiations as at impasse, however, I find that an impasse had not been reached at that time, and that the Agency's imposition of its last proposal was both premature and unlawful.

I have already noted that collective bargaining requires a good-faith effort to reach agreement, and I do not believe that was the attitude demonstrated by the Agency in its dealings with the Union. Rather, the Agency sought to impose those terms it felt appropriate, after listening to the "concerns" of the Union. The meetings of November 25, December 15 and January 7 do not reflect any attempt on management's part to actually work out mutually agreeable language in an atmosphere of compromise. Indeed, no compromise language was ever offered by the Agency at any of its meetings with the Union. At the end of the January 7 meeting, the Agency told the Union it would review the proposals of all the unions "and get back with each union once they [i.e. management] have revised their original proposal." Resp. Ex. 7. This suggested that the Agency was preparing a compromise proposal and that there would be subsequent discussions about the proposal, in an attempt to find mutually acceptable terms. Instead, the Agency was simply preparing to decide on its own what terms were best for all parties and to impose them, leaving the unions the Hobson's choice of accepting those terms or invoking impasse resolution procedures before the parties had even begun trying to compromise.

It is true that the Agency's final instruction did offer at least some modifications of its original proposal. Section III, paragraph 1.e. of the final instruction allows the Union on a quarterly basis to submit names of employees willing and able to sit on SABs, and Section V, paragraph 1.c. added the word "disability" to a list of prohibited areas of inquiry. The latter change appears to have been made at the express request of the Union (see Resp. Ex. 5), but the former change does not appear to have been proposed by the Union at any point in the negotiations. [4/] I would attach considerably more significance to the Agency's "concession" on the nomination of peer members if it had bothered to discuss this proposal with the Union at a negotiation session, rather than waiting nearly three months from the final session and then telling the Union to take it or leave it. As I noted before, the Agency's January 8 memo to the Union (Resp. Ex. 7) suggested that just such discussions were imminent, and a failure to reach a compromise

3. / At the January 7 bargaining session, Mr. Parker, one of the Union negotiators, requested data from the Agency as to the number of SABs the Agency had held from July 1, 2000 to July 21, 2002. Resp. Ex. 7. This indicates that even at that last meeting, the Union was still pursuing its demand to require SABs for positions below the GS-13 level. It goes to the Agency's objection to the cost and time expended by SABs and suggests that the Union was looking for room in which to compromise.

4. / The record is silent as to whether this language was suggested by a different union or devised by the Agency.

after such a meeting might have demonstrated an impasse, on this issue at least. But in fact the Agency was not making "proposals," in the sense that sections 7103(a)(12) and 7114(b) contemplate; it was making unilateral decisions on the terms of its SAB instruction. The Union was given the opportunity to explain its "concerns" on various aspects of the instruction, and the Agency periodically indicated that it might or might not be able to accommodate those concerns, but the decisionmaking on those final terms was entirely unilateral. This is not collective bargaining as the Statute envisions.

Superimposed on the entire process between October 2003 and March 2004 was the Agency's repeated insistence that a large part of the SAB instruction was non-negotiable. This clearly was a continuation of the discord that ensued from the parties' earlier negotiation of Article 16, Section 8 of the new CBA relating to SABs, a provision that was rejected by the agency head and on which the parties then labored fruitlessly to resolve between February and October 2003. As the parties sought to negotiate language of a new SAB instruction, the Agency negotiators asserted a management right to select members of the SAB as a basis for refusing to negotiate any proposal limiting the selecting official in any way. Moreover, the Agency's assertion of non-negotiability covered the Union's proposal to require SABs for more than just GS-13 positions and above. Tr. 125-26, 170-71, 172, 174-76, 178-81. In effect, then, the two most far-reaching changes in the SAB instruction, and the two most controversial issues in the negotiations over the new instruction, were declared off-limits by the Agency from the outset.

It is evident from the DOD memo to the Agency in April 2003 (Resp. Ex. 3 at 3-4) that the Agency's position on non-negotiability was based on the Authority's *Fort Rucker* decision. But this decision, which found a proposal requiring a union observer on rating panels to be non-negotiable, must be read in context with other decisions of the Authority that explain how such proposals may be negotiable. *National Treasury Employees Union and U.S. Department of Commerce, Patent and Trademark Office*, 53 FLRA 539 (1997); *National Federation of Federal Employees, Local 2099 and Department of the Navy, Naval Plant Representative Office, St. Louis, Missouri*, 35 FLRA 362 (1990) (*Naval Plant Representative Office*); *see also Federal Aviation Administration, Washington, D.C.*, 55 FLRA 1233 (2000) (*FAA*). Thus, while the Authority explained in *Fort Rucker* that limitations on the selection of panel members "affect" and "impair" a management right under section 7106(a), the provision may still, "under certain circumstances," be negotiable as an appropriate arrangement under 7106(b)(3). 53 FLRA at 615. In *Customs*, the Authority went further by holding that proposals simply requiring the use of panels, as opposed to a single individual, do not even "interfere" with management's statutory rights to select, to assign work, or to determine its organization. 35 FLRA at 365-70. *See also National Treasury Employees Union and U.S. Department of the Treasury, Customs Service, Washington, D.C.*, 46 FLRA 696, 777-80 (1992), where a proposal specifying the circumstances in which a selection board must be used was found to be a negotiable procedure under section 7106(b)(2). And in *FAA*, the agency terminated a contractual practice allowing a union to participate on selection panels, because it interfered with management's statutory right to select, the Authority upheld an arbitrator's decision that the contractual provision was a lawful arrangement under 7106(b)(3). 55 FLRA at 1236-37.

By relying solely on *Fort Rucker* and by looking only at the language therein that was favorable to management, without considering also the unfavorable language, the Agency here (perhaps at the misguided command of DOD) significantly restricted the scope of negotiations that could occur on its revised SAB instruction. With regard to the possibility of the Union having a role on SABs, the Agency considered only how this impaired management and did not consider whether a narrowly tailored proposal could be negotiated which reasonably address the concerns of employees adversely affected by management's unfettered exercise of its right to select. While the Agency did ultimately agree to allow the Union to offer names of employees who might then be selected to SABs, I have already explained that this was imposed unilaterally by management, not through any actual bargaining and discussion with the Union. And with regard to the types of positions for which SABs would be required, the Agency seems to have missed the point entirely of *Naval Plant Representative Office* that such proposals do not interfere with a management right and are fully negotiable. As late as January 7, 2004, the Union was still seeking information to understand just how much time and effort was expended in conducting SABs for all positions at GS-7 and above. While the Agency told the Union at the bargaining sessions that the current practice was too time-consuming, there is no evidence in the record that the parties actually discussed whether each of their concerns could be accommodated by compromising on the range of positions requiring SABs. The Agency simply declared the issue non-negotiable, and it ultimately imposed its original proposal on the Union, a proposal which the Union president estimated eliminated 90 per-

cent of his unit's employees from SABs. Tr. 31-32. It is clear that the Agency's continued, and improper, assertion of non-negotiability to a large portion of the Union's proposals, interfered significantly with the bargaining process and precluded a proper discussion of the issues facing the parties.

Thus, on March 30, 2004, the Agency was wrong to declare negotiations over and to implement its final proposals unilaterally. An impasse had not occurred, because the Agency had improperly restricted the issues that could be discussed, and it never truly sought to engage in compromise with the Union on the issues it did discuss. The Agency treated the Union as a second-class entity, someone it would listen to and take suggestions from, but not someone it would seriously engage in true negotiations. The Agency listened to the Union for three short meetings and then decided on its own which of the Union's concerns merited a modification of management's original proposal. One party's unilateral declaration of impasse does not mean that an impasse has actually been reached. *See Veterans Administration, Washington, D.C.* and *Veterans Adminis-tration Medical Center, Leavenworth, Kansas*, 32 FLRA 855, 873-74 (1988). When the course of bargaining demonstrates that further negotiations would be fruitless, then an impasse has been reached. In my opinion, that point had not been reached in this case.

First, for the reasons I have already stated, I feel that there was no impasse here, because the Agency had not engaged in true good-faith bargaining. If the Agency had truly sought to obtain agreements on specific terms of the proposed instruction with the Union, and had discussed the acceptability of various compromise proposals, then it might be said that further bargaining was doomed; but this hypothesis was never put to the test. Second, I put particular emphasis on the lack of any true discussion of compromise positions concerning what positions would be subject to SABs. The Agency's first, and final, proposals on this issue exempted it from using SABs except for positions GS-13 and over; from the Union's perspective, this excluded almost the entire bargaining unit. The Agency's rejection of the Union's proposal was based partly on the asserted non-negotiability of the issue and partly on the time and expense of conducting SABs for hundreds of vacancies. While the Agency's assertion of non-negotiability was at best a distortion of the law and at worst flatly wrong, the Agency's objection based on the time and expense of SABs, and the Union's January 7 request for information on the number of SABs conducted in the past, cried out for further discussion and lent itself easily to a compromise. Although the Statute does not require either party to accept a proposal or make any particular concession, the Agency's error here was in shutting off any further discussion of compromise when a compromise appeared to be easily within reach. I find that the Respondent simply lost patience with the process, due in part to a mistaken belief that much of the issues were non-negotiable and in further part to a belief that it was required only to listen to the Union before implementing what it deemed best.

For all the reasons stated above, I conclude that the Agency terminated the bargaining process prematurely on March 30, 2004, and implemented its new SAB instruction before an impasse had been reached. Therefore, the Respondent violated section 7116(a)(1) and (5) and committed an unfair labor practice.

REMEDY

Where, as here, an agency has failed to negotiate fully over the exercise of a management right, the guidelines of *Federal Correctional Institution*, 8 FLRA 604 (1982) (*FCI*) are applicable to whether a status quo ante remedy is appropriate.

The first factor cited in *FCI* is whether, and when, the Agency notified the Union of the proposed change; to the Agency's credit, it did provide adequate notice of its proposed change, both the initial proposal submitted in October 2003 and the final version announced on March 30 but not implemented until June 3. The second factor, whether and when the Union requested bargaining, weighs in the Union's favor. As to the third factor, I consider the Agency's bargaining misconduct to be willful. While it appears that the Agency negotiators sincerely believed that some of the Union's proposals were non-negotiable, this was, as I have already discussed, based on a seriously incomplete reading of the case law, a misreading that it expanded beyond the issue of Union membership on SABs to the question of what positions required SABs. Moreover, since the Agency's basic approach to the negotiations failed to reflect a sincere desire to reach a mutual agreement, this can only be described as willful.

The final two factors described in *FCI* involve weighing the adverse impact of a status quo ante remedy on the Agency's operations against the adverse impact of the unilateral change on employees. The Agency argues now, as it did at the bargaining table, that returning to the pre-2004 SAB procedures would be unduly time-consuming, but there is little or no evidence to support this argument. One witness, Ms. Hamilton, testified that the Agency was "having basically 365 Selection

Advisory Boards a year." Tr. 109. This comment struck me as a rather off-hand attempt to flippantly quantify an issue that could have been conclusively established by the Agency with documentation in its possession. *See* Resp. Ex. 7. This number, even if it were accurate, refers to the entire Agency and not the unit represented by the Union. Nonetheless, I do recognize that in a unit of 830 employees, utilizing SABs for all vacancies in GS-7 positions and higher, instead of just for GS-13 and higher, will require the Agency to conduct a significant number of SABs. On the other hand, the Agency's premature termination of bargaining and imposition of an unwanted change in promotion procedures on the bargaining unit communicated to employees that they were essentially powerless to resist the Agency when it wanted to make a change. The Agency belittles the Union's counter-proposal as merely seeking to continue the old instruction, but this was a set of procedures that the Agency had agreed to in negotiations and had lived with for many years. As recently as January 2003, the Agency had executed a CBA continuing those procedures. Thus I find it less than persuasive that the resumption of the old SAB procedures, at least for the duration of good-faith bargaining, would significantly disrupt the Agency's operations. Filling vacancies through the use of rating panels, rather than by a single individual, has wide recognition in the Federal sector, as reflected in FLRA case law, and the Authority has found such a requirement to be related to the merit system principle of ensuring fair consideration to applicants for promotion. *Naval Plant Representative Office*, 35 FLRA at 366. Since June of 2004, bargaining unit employees have not had the assurance of seeing a large number of their promotion applications reviewed by a panel, and this is an adverse effect that carries weight. In balance, I find that the FCI factors weigh in favor of imposing a status quo ante remedy and requiring the Agency to utilize the pre-2004 SAB instruction, at least until it has completed good-faith bargaining on a revised instruction.

I therefore recommend that the Authority issue the following remedial order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of the Navy, Naval Aviation Depot, Jacksonville, Florida (the Agency), shall:

1. Cease and desist from:

   (a) Unilaterally implementing changes in conditions of employment without bargaining over those changes to the extent required by the Statute with the International Federation of Professional and Technical Engineers, Local 22 (the Union), the exclusive representative of certain of its employees.

   (b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action:

   (a) Rescind the Selection Advisory Board procedures, NADEPJAXINST 12000.1, that were promulgated on June 3, 2004, and replace them with the version of those procedures that was in effect immediately before that date.

   (b) Notify, and upon request bargain with, the Union to the extent required by the Statute concerning any proposed changes in Selection Advisory Board procedures.

   (c) Post at its Jacksonville, Florida facility, a copy of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer of the Agency, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

   (d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Atlanta Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 25, 2006.

RICHARD A. PEARSON

Administrative Law Judge